

**AIDA RATINI MANSOR
& ANOR v. SUNGEI WANG PLAZA SDN BHD & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[CIVIL SUIT NO: WA-12ANCVC-24-01-2023]
29 AUGUST 2023

Abstract – *In dealing with the issue of increased rental not agreed to by the tenant, the remedy open to the landlord is to sue the tenant for vacant possession, and not by way of a writ of distress; and a landlord in an ex parte writ of distress could not seek an order for the premises to be locked up as such right is neither provided for under ss. 5 and 7 of the Distress Act 1951 nor under Form 186 of O. 75 r 3 of the Rules of Court 2012.*

LANDLORD AND TENANT: *Rent – Distress – Ex parte distress order based on outstanding rental – Increased rent not agreed to by tenant – Whether landlord could apply for ex parte writ of distress – Whether remedy is to sue tenant for vacant possession – Whether landlord in ex parte writ of distress could apply for court order to lock up tenant's premises – Distress Act 1951, ss. 5 & 7 – Rules of Court 2012, O. 75 r. 3*

The first appellant was a tenant of the respondents. The rent was RM30,000 per month. The respondents unilaterally increased the rent to RM69,026.46 per month which was not agreed to by the first appellant. When the first appellant failed to pay the rent, the respondents applied to the Sessions Court and obtained an *ex parte* distress order based on a purported outstanding rental of RM720,262.60 based on the alleged increased rent. The respondents also obtained an order to lock the premises. The appellants thus applied to set aside the distress order which was dismissed by the Sessions Court. Hence, this appeal. The issues for the court's determination were: (i) whether a landlord could apply for an *ex parte* writ of distress for an increased rent not agreed to by a tenant; and (ii) whether a landlord in an *ex parte* writ of distress could apply for a court order to lock up the tenant's premises.

Held (allowing appeal with costs):

- (1) A landlord could not apply for an *ex parte* writ of distress for an increased rent not agreed to by a tenant. If a landlord raised the rent and the tenant declined to agree, the only remedy open to the landlord is, after giving the tenant a proper notice to quit, to sue him for vacant possession, but he had no right to distrain for his increased rent. (para 9)

- A (2) A landlord in an *ex parte* writ of distress could not apply for a court order to lock up the tenant's premises. Such a right is not provided under ss. 5 and 7 of the Distress Act 1951. It is also not provided for under Form 186 of O. 75 r 3 of the Rules of Court 2012. (para 12)

Case(s) referred to:

- B *Dr Mathew Sebastian v. Metroplex Leasing And Credit Corporation Sdn Bhd* [1996] 2 BLJ 238 HC (*refd*)
Selvarani KV Velusamy v. Sundara Raju Kasamoorthie [1999] 6 CLJ 477 HC (*refd*)
Wong Choon For v. Lim Chee Hooi & Ors [2002] 5 CLJ 556 HC (*refd*)

Legislation referred to:

- C Distress Act 1951, ss. 5, 7
Rules of Court 2012, O. 75 r. 3
For the appellant - Phang Soon Mun & Tang Kian Khuang; M/s Han & Partners
For the respondent - Annie Varghese & Jayasri Nadarajan; M/s Hakeem Arabi & Assocs
[Editor's note: Appeal from Sessions Court, Kuala Lumpur; Civil Suit No: WA-B54-75-09-2022 (overruled).]

- D
Reported by S Barathi

JUDGMENT

- E **Leong Wai Hong JC:**

Introduction

- F [1] At first blush, the facts in this appeal before me looked complicated. However, when the court used the Socratic method of questioning, the facts became crystal clear.

[2] The legal issues are simpler. They are:

- (i) can a landlord apply for an *ex parte* writ of distress for an increased rent not agreed to by a tenant? and
G (ii) can a landlord in an *ex parte* writ of distress apply for a court order to lock up the tenant's premises?

Background Facts

- H [3] The first appellant AR Lahore Enterprise is a tenant of the respondents Sungei Wang Plaza Sdn Bhd and Sungei Wang Holdings Sdn Bhd. The second appellant is her husband.

- I [4] The rent was RM30,000 per month. The respondents unilaterally increased the rent to RM69,026.46 per month which was not agreed to by the first appellant. (See: encl. 15 para. 607 respondents' letter dated 23 November 2021).

[5] The first appellant failed to pay the rent to the respondents.

Court Proceedings

[6] The respondents applied to the Sessions Court and obtained an *ex parte* distress order based on a purported outstanding rental of RM720,262.60 based on the alleged increased rent of RM69,026.46 per month. The respondents also obtained an order to lock the premises.

[7] The appellants applied to set aside the distress. The Sessions Court dismissed the application. I allowed the appeal on 16 August 2023 with costs. These are my grounds of judgment.

Can A Landlord Apply For An Ex Parte Writ Of Distress For An Increased Rent Not Agreed To By A Tenant?

[8] The answer is no.

[9] In my view, a landlord cannot apply for an *ex parte* writ of distress for an increased rent not agreed to by a tenant. If a landlord raised the rent and the tenant declined to agree, the only remedy open to the landlord is, after giving the tenant a proper notice to quit, to sue him for vacant possession but he had no right to distrain for his increased rent. (See: *Wong Choon For v. Lim Chee Hooi & Ors* [2002] 5 CLJ 556 and [2002] 5 MLJ 252 Ramli Ali JC).

[10] In *Wong Choon For v. Lim Chee Hooi & Ors* [2002] 5 CLJ 556 and [2002] 5 MLJ 252 Ramli Ali JC said:

In the circumstances, it is obvious that *the new rental of RM1,500 per month with effect from January 2000 was unilaterally fixed by the respondents (as the landlord)*. It was not even effectively communicated to the appellant. The appellant had no knowledge about it. *Thus, the appellant had never agreed to the said new rental*. In fact, the appellant had not been to the first respondent's office to discuss about the new rental as required by the first respondent *vide* his letter dated 3 December 1999 to the appellant. Therefore, I can safely conclude that there is no new tenancy agreement. *In order to support a claim for such increased rental or to justify the distress therefor, the respondents must show that the tenant (the appellant) had agreed to pay such increased rental or facts from which such assent on the part of the appellant might be inferred by the court.*

In *Jenaboo & Anor v. Vytilingum* (1885) 4 Ky 78, Wood J in dealing with the issue of increased rental to justify the issue of a writ of distress, has said: ... that *there was no power in a landlord to increase his tenant's rent by a notice, and unless there was an agreement by the tenant to pay such increased rent, or there were such facts in the case, as by his conduct or otherwise, from which the court could infer an assent on his part, he could not be made liable therefor; that if a landlord considered he should get more rent and the tenant declined to pay it, the only remedy open to the landlord was, after giving the tenant a proper notice to quit, to sue him in action of ejectment; but he had no right to distrain for his increased rent. That to entitle a landlord to distraint there must be an agreement to pay rent, and that for a fixed and definite amount.*

- A In that case, the distress was declared to be irregular and improper and was discharged on the ground that the rent at RM5 per month was not agreed to and the amount of the rent that should be paid per month was a matter in dispute between the landlord and the tenant.
(emphasis added)
- B *Can A Landlord In An Ex Parte Writ Of Distress Apply For A Court Order To Lock Up The Tenant's Premises?*
- [11] The answer is also no.
- [12] A landlord in an *ex parte* writ of distress cannot apply for a court order to lock up the tenant's premises. Such a right is not provided under ss. 5 and 7 of the Distress Act. It is also not provided for under Form 186 of O. 75 r. 3 of the Rules of Court 2012. See also: 75/3/1 *Malaysian Civil Procedure* 2021 Volume 1 Sweet & Maxwell.
- C [13] In *Selvarani KV Velusamy v. Sundara Raju Kasamoorthie* [1999] 6 CLJ 477, Chin Fook Yen J also said at para. 486:
- D ... premises were locked up in the course of the execution, thus preventing the right of entry. Such acts, if proven, are unlawful and the court certainly cannot condone them. However, they are not basis for setting aside the writ of distress unless the writ itself was defective and that is not the case here. The complaint here is that in the process of execution the authority had been exceeded resulting in an unlawful execution. In as much as the writ was concerned there was nothing unlawful. I am of opinion the remedy is by instituting or commencing an action for damages for wrongful distress. It has been held in the case of *Chop Chye Hin Chong v. Ng Yeok Seng* [1934] SSR (Vol. III.) 265, before the Supreme Court Appellate Civil Jurisdiction ... (emphasis added)
- E [14] *Dr. Mathew Sebastian v. Metroplex Leasing And Credit Corporation Sdn Bhd* [1996] 2 BLJ 238; [1996] 5 MLJ 558 at 562H is a case on wrongful execution of a writ of sale and seizure on the premises by the bailiff. The premises were sealed off and locked up by the bailiff. This is thus not a writ of distress case, but it is instructive how the court treats a wrongful execution.
- F [15] KC Vohrah J held that, the bailiff was acting on the instructions of the defendant to lock up the premises and the defendant is liable for trespass.
- G **Decision**
- H [16] I allow the appeal with costs. The order of the Sessions Court is set aside. Respondents to pay costs of RM10,000 here and below subject to allocatur.
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